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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Case No. 12cv1262 DMS (BGS)

Date: May 16, 2013
Time: 1:30 p.m.
Judge: Hon. Dana M. Sabraw
Ctrm: 10, Second Floor
Trial Date: Not Set

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Defendant City of San Diego (hereinafter “City”), hereby respectfully submits the following opposition to Plaintiff Melissa Wilde’s (hereinafter “Plaintiff”) motion for attorneys fees [Doc. No. 12 *et seq.*]:

I

SUMMARY OF THE OPPOSITION

Plaintiff’s counsel admittedly spent less than 100 hours in representing Plaintiff in this matter which settled in mediation before any discovery plan was in place or discovery exchanged. Although Plaintiff’s counsel claims a normal hourly rate of \$695, Plaintiff is claiming \$225,000 in legal fees. Plaintiff is requesting \$2,250.00 per hour for the 100 hours he spent on the matter which is unconscionable for a normal Section 1983 action where Plaintiff argues liability was not at issue. The numbers do not lie:

\$695: Hourly rate claimed by Plaintiff’s counsel Mr. Mitchell.

\$2,250: Hourly rate claimed by Mitchell & Gilleon for 100 hours of work.

324: The number of hours it would take to bill Plaintiff at the “Normal” hourly rate of \$695 per hour to reach \$225,000.

6/7: The number of unsuccessful claims alleged by Plaintiff.

99.7: Total number of hours worked on Wilde’s case.

55.3: Total number of hours Mitchell & Gilleon spent on the six unsuccessful state law claims.

\$6,667-\$15,000: Fees Mitchell & Gilleon agreed to for each of the other five Plaintiffs they represented against the City and Arevalos.

\$68,561.50: Amount of Mitchell & Gilleon’s bill for this matter (99.7 hours at either \$695 or \$495 per hour.)

Plaintiff’s counsel represented five other plaintiffs against the City and Arevalos contemporaneously with Plaintiff Wilde. The issues were the same in all the cases. The main difference, as Plaintiff argues, was that this matter was even less complex because Arevalos was convicted of soliciting a (sexual) bribe making liability “res judicata.” (Moving papers, [p. 11, lines 10-13].) Therefore, counsel’s

1 fee should be similar or less than the fee for the other five plaintiffs especially
 2 because they all settled in or immediately after mediation. For each of the other
 3 five Plaintiffs, Mitchell & Gilleon agreed to a fee between \$6,667 and \$15,000 per
 4 plaintiff. (Decl. of Keith Phillips, ¶¶ 2-4.)

5 Plaintiff's counsel admits the only significant tasks (excluding the
 6 unsuccessful prosecution of Plaintiff's pendent state law claims), that they
 7 performed in this matter were:

- 8 1. Prepare for and attend mediation with Thomas Sharkey;
- 9 2. Draft and file complaint; and
- 10 3. Mediate and settle the matter with retired Judge Lawrence Irving.

11 (Phillips Decl., ¶¶ 3, 6.)

12 Plaintiff's claimed attorney's fees are unconscionable given the fact that
 13 Plaintiff settled the case before the City even answered or discovery propounded.
 14 (The parties went to mediation and settled the underlying claim, but not the
 15 attorney's fees.) The parties never attended an Early Neutral Evaluation
 16 Conference and never prepared a discovery plan. (Request for Judicial Notice No.
 17 1.) The parties never drafted initial disclosures or propounded any discovery.
 18 (Phillips Decl., ¶ 7.) Yet somehow, Plaintiff's counsel feels they are entitled to
 19 \$2,250 per hour because they had a contingency fee agreement with Plaintiff.

20 Furthermore, the vast majority of Plaintiff's billing was for unsuccessfully
 21 trying to file state law claims that were clearly barred by the statute of limitations.
 22 In fact, Mitchell & Gilleon billed 55.3 of the 99.7 hours on Plaintiff's two motions
 23 for leave to file her pendent state law claims against the City which the State
 24 Superior Court rejected based upon the obvious statute of limitations bar.
 25 Plaintiff's counsel also spent 3.5 hours just alleging the barred state law claims in
 26 the Complaint which were dismissed by this Court. On that basis alone, **Plaintiff's**
 27 **\$68,561.50 bill should be reduced by half.**

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1 Plaintiff's counsel is also charging \$347.50 for an initial consultation with
 2 the Plaintiff when Plaintiff advertises a "free consultation" on his own website.
 3 (See Phillips Decl., ¶ 9; Exhibit 5 to Phillips Decl.) Finally, there is a single entry
 4 of double billing for \$69.50 on July 18, 2012. (Phillips Decl., ¶ 10.)

5 This case is not complex, especially because Plaintiff alleges there is no
 6 issue as to liability because it is "res judicata" based upon Arevalos' conviction.
 7 (Moving papers, [p. 11, lines 10-13].) Accordingly, Plaintiff's fees should be
 8 reduced as follows:

9	TOTAL FEES CHARGED ON BILL:	\$68,561.50
10	LESS FEES FOR STATE LAW CLAIMS:	\$38,353.50
11	LESS FEES FOR SEEKING FEES:	\$ 8,861.25
12	LESS FEES FOR INITIAL CONSULTATION:	\$ 347.50
13	LESS FEES FOR DOUBLE BILLING:	\$ <u>69.50</u>
14	TOTAL AWARD:	\$20,929.75

15 For the reasons cited below, Plaintiff's allowable fees, (if Mr. Mitchell is
 16 allowed to collect \$695 per hour), would be \$20,929.75 which is consistent with
 17 similar representation by Mitchell & Gilleon.

18 II

19 **BRIEF STATEMENT OF THE FACTS**

20 On March 15, 2011, after seeing that former SDPD Traffic Officer Anthony
 21 Arevalos had been arrested for various acts of sexual battery and soliciting bribes,
 22 Ms. Melissa Wilde contacted the San Diego Police Department to complain of her
 23 contact with former officer Arevalos.

24 Plaintiff had contact with Arevalos on October, 22, 2010. Plaintiff admitted
 25 she had been drinking with a friend in a nightclub in the Gaslamp area. She said
 26 she had about four vodka drinks during the time she was in the club. She said she
 27 was wearing low rise jeans and a low cut tank top. She said she was not wearing a
 28 bra. She was parked in the 400 block of Island Avenue and as soon as she pulled

1 out of her parking place, she was stopped by Arevalos. When he told her he
 2 wanted to administer a breath test, she adamantly refused and told him she did not
 3 want a DUI. She said she would park her car and take a cab home.

4 Arevalos asked her, "What are you going to do about this? Ultimately,
 5 Plaintiff agreed that Arevalos could "help himself" if Arevalos did not arrest
 6 Ms. Wilde for a DUI. Arevalos touched Ms. Wilde's breast and the inside of her
 7 waistband of her low cut jeans and Ms. Wilde agreed to "flash" her breasts at
 8 Arevalos. In return, Arevalos did not arrest Wilde for driving under the influence.
 9 That night, Ms. Wilde's only protest was having to take the breathalyzer.

10 After his arrest, Wilde reported it to the San Diego Police Department for
 11 the first time. The jury convicted Arevalos on the charges filed on behalf of
 12 Ms. Wilde.

13 III

14 LEGAL ANALYSIS

15 A. The United States Supreme Court Prohibited Awarding Fees Based 16 Upon Contingency Fee Agreements

17 Plaintiffs rely on the following case law in arguing they should be awarded
 18 the amount of their contingency fee agreement:

19 *Hamner v. Rios*, 769 F.2d 1404 (9th Cir. 1985);
 20 *Blum v. Stenson*, 465 U.S. 886 (1984);
 21 *Kirchoff v. Flynn*, 786 F.2d 320 (7th Cir. 1986);
 22 *Riverside v. Rivera*, 477 U.S. 561 (1986);
 23 *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968);
 24 *Hensley v. Eckerhart*, 461 U.S. 424 (1983).

25 In 1989, after all of Plaintiff's cited authorities, the United States Supreme
 26 Court ruled that "The contingent-fee model, premised on the award to an attorney
 27 of an amount representing a percentage of the damages, is . . . inappropriate for the
 28 determination of fees under § 1988." *Blanchard v. Bergeron*, 489 U.S. 87, 96-97,
 109 S.Ct. 939, 946 (U.S.La., 1989). The Ninth Circuit Court of Appeal has

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confirmed that District Courts shall not base an award under section 1988 on a contingency fee agreement:

A district court may not rely on a contingency agreement to increase or decrease what it determines to be a reasonable attorney's fee. *See Davis v. City & County of San Francisco*, 976 F.2d 1536, 1548-49 (9th Cir. 1992), *vacated in part on other grounds*, 984 F.2d 345 (9th Cir. 1993); *Quesada v. Thomason*, 850 F.2d 537, 543 (9th Cir. 1988) (holding that district court abused its discretion in applying downward multiplier to lodestar amount based on contingency agreement); *see also City of Burlington v. Dague*, 505 U.S. 557, 566-67, 112 S.Ct. 2638, 120 L.Ed.2d 449 (1992) (holding that federal fee-shifting statutes do not allow for upward adjustments to lodestar amount based on contingency agreement).

Van Gerwen v. Guarantee Mut. Life Co., 214 F.3d 1041, 1048 (9th Cir. (Cal.), 2000).

Accordingly, it is improper for Plaintiff to request \$225,000 in fees based upon the “value of their representation” as “reflected in [their] agreement” with their client. As stated above, a contingency fee agreement may not even be used as a negative or positive multiplier. (*Id.*) Thus, the Courts must look to the *Lodestar* method to determine a reasonable fee under Section 1988. *See, e.g., Traditional Cat Ass’n, Inc. v. Gilbreath*, 340 F.3d 829, 832-835 (9th Cir. 2003).

B. Plaintiff Erroneously Relies Upon The Johnson 12 Factors Test in Lieu of the Lodestar Method

Plaintiff argues that the Court should consider seven factors (one of which is whether there is a contingency fee agreement) when determining what a “reasonable fee” is under Section 1988 citing to *Hensley v. Eckerhart*, 461 U.S. 424, 430 (1983). However, the Supreme Court is really referring to 12 factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). Those factors are:

(1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed

or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the “undesirability” of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. 488 F.2d, at 717-719. These factors derive directly from the American

Hensley v. Eckerhart, 461 U.S. 424, 430, 103 S.Ct. 1933, 1938 (1983).

Twenty Seven years later, the United States Supreme Court ruled that “This [*Johnson* 12 factors] method, however, ‘gave very little actual guidance to district courts. Setting attorney’s fees by reference to a series of sometimes subjective factors placed unlimited discretion in trial judges and produced disparate results.’” *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 552, 130 S.Ct. 1662, 1672 (2010). The Court went on to say that the *Lodestar* method was not perfect, but the “method yields a fee that is presumptively sufficient to achieve this objective.” *Id.* at p. 1673. Thus, contrary to Plaintiff’s argument, the proper method for determining a “reasonable fee” under Section 1988 is the *Lodestar* method.

C. It is Presumed that Plaintiff’s Reasonable Attorney’s Fee is His Normal Hourly Rate Multiplied by the Total Hours on the Matter

The “lodestar” is the presumptively reasonable rate, which is reached by multiplying the number of hours reasonably expended by the prevailing party with a reasonable hourly rate, then making any adjustments as necessary to account for factors not already subsumed within the initial lodestar calculation. *Mendez v. County of San Bernardino*, 540 F.3d 1109, 1129-30 (9th Cir. (Cal.), 2008). Here, Plaintiff admits her attorneys spent 99.7 hours on the matter for a grand total of \$68,561.50 in fees. (See Phillips Decl., ¶ 6; Exhibits 1-3 to Phillips Decl.) It is presumed this is a reasonable fee for Plaintiff. *Mendez v. County of San Bernardino*, 540 F.3d 1109, 1129-30 (9th Cir. (Cal.), 2008). However, Plaintiff’s fees are subject to reduction for unnecessary fees, etc. (*Id.* See also *Hensley v. Eckerhart*, 461 U.S. 424 (1983); *Blanchard v. Bergeron*, 489 U.S. 87, 96-97, 109

1 S.Ct. 939, 946 (U.S.La., 1989); *Van Gerwen v. Guarantee Mut. Life Co.*, 214 F.3d
 2 1041, 1048 (9th Cir. (Cal.), 2000).)

3 **D. Plaintiff's Attorneys' Fees Should Be Reduced to Adjust for the**
 4 **Unreasonably High Hourly Rate Charged**

5 In exercising its discretion, the court may "consider all of the facts and the
 6 entire procedural history of the case in setting the amount of a reasonable
 7 attorney's fees award." *Meister v. Regents of Univ. of Calif.*, 67 Cal.App.4th 437,
 8 452 (1998). Furthermore, when using the lodestar method to calculate attorney
 9 fees under the FEHA, the ultimate goal is "to determine a 'reasonable' attorney
 10 fee, and not to encourage unnecessary litigation of claims that serve no public
 11 purposes either because they have no broad public impact or because they are
 12 factually or legally weak." *Chavez*, 47 Cal.4th at 985.

13 Plaintiff claims that Mr. Mitchell's hourly rate is \$695 per hour. Plaintiff
 14 justifies that rate based on Mr. Mitchell's experience and credentials. However,
 15 the *Lodestar* method is not a subjective standard, but is an objective standard for
 16 what a reasonable rate would be in the community. *Sorenson v. Mink*, 239 F.3d
 17 1140, 1146 (9th Cir. 2001). Today, panel attorneys are paid an hourly rate of \$125
 18 per hour in non-capital cases, and, in capital cases, a maximum rate of \$178 per
 19 hour. (<http://www.uscourts.gov/FederalCourts/AppointmentOfCounsel.aspx>.)

20 Plaintiff fails to justify \$695 as a reasonable rate for a lawyer in this matter
 21 considering the very simple nature of this case. Plaintiff Wilde was one of six
 22 Plaintiffs suing the City and Arevalos for excessive force under Section 1983.
 23 (Phillips Decl., ¶ 2.) It was an excessive force case under Section 1983.
 24 Moreover, Plaintiff argues in her moving papers that liability was not at issue due
 25 to Arevalos' conviction which made the liability issue in this matter *res judicata*.
 26 (Moving papers, [p. 11, lines 10-13].) Accordingly, the only issue at trial would
 27 have been Plaintiff's damages according to Plaintiff. (*Id.*) Thus, the objectively
 28 reasonable rate for this matter should be no more than \$500 per hour because it is a

1 reasonable rate in the community wherein liability was not at issue. In any event,
 2 Mr. Mitchell's skill and experience are subjective factors that do not dictate what
 3 the objectively reasonable rate is.

4 **E. Plaintiff's Claimed Attorneys' Fees Should be Reduced Because They**
 5 **Are Unnecessary, Excessive and/or Duplicative**

6 Attorney's fees may be awarded only for hours *reasonably spent*. *Ketchum*
 7 *v. Moses*, 24 Cal.4th 1122, 1137 (2001). "[T]he predicate of *any* attorney fee
 8 award, whether based on a percentage-of-the-benefit or a lodestar calculation is the
 9 necessity and usefulness of the conduct for which compensation is sought."
 10 *Thayer v. Wells Fargo Bank*, 92 Cal.App.4th 819, 846 (2001) (italics in orig.).
 11 Thus, the court should properly exclude hours "that are excessive, redundant, or
 12 **otherwise unnecessary**." *McGown v. City of Fontana*, 565 F.3d 1097, 1102 (9th
 13 Cir. 2009) (emphasis added). In other words, the court may reduce hours claimed
 14 when the time was "not reasonably expended," such as where the record reflects
 15 duplicative efforts. *Sorenson v. Mink*, 239 F.3d 1140, 1146 (9th Cir. 2001).
 16 "Padding" is not subject to compensation. *Ketchum*, 24 Cal.4th at 1132. In fact,
 17 the California Supreme Court has held that "[a] fee request that appears
 18 unreasonably inflated is a special circumstance permitting the trial court to reduce
 19 the award or deny one altogether." *Serrano v. Unruh*, 32 Cal.3d 621, 635 (1982);
 20 accord, *Ketchum*, 24 Cal.4th at 1137-1138. In *Serrano v. Unruh*, the California
 21 Supreme Court cited with approval a federal case encouraging a complete denial of
 22 fees where the fee request was unreasonably excessive.

23 If ... the Court were required to award a reasonable fee
 24 when an outrageously unreasonable one has been asked
 25 for, claimants would be encouraged to make
 26 unreasonable demands, knowing that the only
 27 unfavorable consequence of such misconduct would be
 28 reduction of their fee to what they should have asked in
 the first place. To discourage such greed, a severer
 reaction is needed.

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1 *Serrano v. Unruh*, 32 Cal.3d at 635, citing *Brown v. Stackler*, 612 F.2d 1057, 1059
 2 (7th Cir. 1980) (emphasis added); *Meister v. Regents of Univ. of Calif.*,
 3 67 Cal.App.4th 437, 452 (1998). Likewise, in *Chavez v. City of Los Angeles*,
 4 47 Cal.4th 970, 976 (2010), the California Supreme Court held that a grossly
 5 inflated fee request alone was sufficient to justify denying attorney fees altogether.
 6 *Chavez*, 47 Cal.4th at 991.

7 **1. More than Half of Plaintiff's Billing Were Related Solely to**
 8 **Plaintiff's Unnecessary and Unsuccessful State Law Claims**

9 “In *Hensley*, the Supreme Court considered “whether a partially prevailing
 10 plaintiff may recover an attorney’s fee [under § 1988] for legal services on
 11 unsuccessful claims.” 461 U.S. at 426, 103 S.Ct. 1933. *The [United States*
 12 *Supreme] Court held that a partially prevailing plaintiff generally may not*
 13 *recover fees for her unsuccessful claims*: “the level of a plaintiff’s success is
 14 relevant to the amount of fees to be awarded.” *Id.* at 430, 103 S.Ct. 1933. The
 15 [Supreme] Court concluded that “Congress has not authorized an award of fees
 16 whenever it was reasonable for a plaintiff to bring a lawsuit or whenever
 17 conscientious counsel tried the case with devotion and skill. ... [T]he most critical
 18 factor is the degree of success obtained.” *Id.* at 436, 103 S.Ct. 1933. Significantly,
 19 the Court declared the standard announced in *Hensley* to be “generally applicable
 20 in all cases in which Congress has authorized an award of fees to a ‘prevailing
 21 party.’ ” *Id.* at 433 n. 7, 103 S.Ct. 1933.” *Aguirre v. Los Angeles Unified School*
 22 *Dist.*, 461 F.3d 1114, 1118 (9th Cir. (Cal.), 2006).

23 *Time spent on unsuccessful claims may be excluded from the Lodestar*
 24 *calculation.* *Traditional Cat Ass’n, Inc. v. Gilbreath*, 340 F.3d 829, 832-835 (9th
 25 Cir. 2003).

26 In the instant case, Plaintiff’s fee request is unreasonably inflated. Plaintiff’s
 27 counsel spent 55.3 out of 99.7 total hours on the clearly barred claims. (Phillips
 28 Decl., ¶ 8; Exhibit 2-3 to Phillips Decl.) Plaintiff’s first six claims out of seven

1 were barred because Plaintiff failed to file a claim. (Phillips Decl., ¶ 8.) Plaintiff
 2 acknowledged the fact that she did not file a claim. (Complaint, ¶ 26.) However,
 3 as will be discussed below, Plaintiff insisted on filing two unsuccessful motions for
 4 relief from the claims filing requirements and adamantly refused to withdraw her
 5 claims which eventually forced the City to file a Motion to Dismiss, which this
 6 Court granted. (See Document #11.)

7 **a. Plaintiff Filed Two Unnecessary and Unsuccessful Motions**
 8 **to be Relieved of the Claims Filing Requirements**

9 The California Government Claims Act conditions the right of a “suit for
 10 money or damages” against a public entity, by requiring that any such cause of
 11 action be based upon prior compliance with the claim presentation provisions of
 12 the Government Code. Cal. Gov’t Code §§ 945.4-945.6. Under California law,
 13 compliance with statutes which condition the right to sue a public entity, are more
 14 than procedural requirements, they are elements of a cause of action and condition
 15 precedent to the maintenance of an action against the public entity and/or its
 16 employee(s). *Wills v. Reddin*, 418 F.2d. 702 (9th Cir. 1969). Government Code
 17 section 911.2 grants a plaintiff six months to file a claim after the date of the
 18 incident.

19 In this action, there is no dispute that Plaintiff failed to file a timely claim
 20 with the City in compliance with the aforementioned Government Claims Act.
 21 (Complaint, ¶ 26.) Plaintiff alleged in her Complaint that the date of the incident
 22 was October 22, 2010. (Complaint, ¶ 14.) Plaintiff also alleged that she filed a
 23 claim against the City for damages on November 15, 2011, **thirteen months after**
 24 **the incident**. (Complaint, ¶ 22.) Accordingly, Plaintiff’s first six claims for relief,
 25 (pendent state claims) are barred by California Government code section 911.2.

26 Furthermore, Plaintiff couldn’t even seek relief from the Government
 27 Claims Act because she failed to file a petition within the one-year period.
 28 Government Code section 946.6(c) and subdivision (b) of Section 911.4 provide a

1 one-year statute of limitations for Plaintiff's petition. Therefore, Plaintiff's first
 2 claim for relief, a petition to file a late claim was undeniably barred by the one-
 3 year statute of limitations for filing such a petition.

4 Plaintiff admits that the incident occurred on October 22, 2010. (Complaint,
 5 ¶ 26.) She also admits that she did not file her application to file a late claim
 6 within the one-year period, by October 22, 2011. (Complaint, ¶ 26.) Plaintiff did
 7 not file the required petition to file a late claim with the Court in compliance with
 8 Government Code section 946.6(a) until April 26, 2012, when she filed the
 9 Complaint in this action. Plaintiff's "Petition" was not filed until eighteen months
 10 after the cause of action accrued. (Complaint, ¶ 26.) Accordingly, Plaintiff's
 11 unsupported "Petition" was clearly untimely and barred by the statute of
 12 limitations.

13 In fact, the Court loses jurisdiction to grant relief from the Government
 14 Claims Act after one year. *Garber v. City of Clovis*, 698 F.Supp.2d 1204, 1211-12,
 15 1217-18 (E.D. Cal., 2010) citing *Munoz v. State of California*, 33 Cal.App.4th
 16 1767, 1779 (1995). (In California, a plaintiff's pendent state law claims against a
 17 municipal employee is barred unless the plaintiff complied with the Government
 18 Claims Act, and if they do not, the plaintiff must file a petition within a year to be
 19 excused or the courts are "without jurisdiction to grant relief under
 20 Section 946.6.)

21 Despite the black letter law and mountain of case law specifically precluding
 22 Plaintiff's first six claims, Plaintiff filed not one but two futile motions to be
 23 relieved of the claims filing requirements, one with this Court and one with the
 24 California Superior Court. (See documents 2-1 through 2-5; Declaration of Keith
 25 Phillips, ¶ 8; Exhibit 4 to Phillips Decl.) Both were unsuccessful. (*Id.* and Exhibit
 26 4 to Phillips Decl.) Therefore, the Court should reduce the hours reasonably spent
 27 by Plaintiff's counsel on the matter by 55.3 hours or \$38,353.50 (if Plaintiff is
 28 ///

1 allowed to charge \$695 per hour) in total fees related to Plaintiff's pendent state
 2 claims. (See Phillips Decl., ¶ 8; Exhibit 2-3 to Phillips Decl.)

3 **b. Plaintiff Forced the City to File a Motion to Dismiss, Which**
 4 **This Court Granted Against All of Plaintiff's Claims,**
 5 **Except the Section 1983 Claim**

6 Plaintiff's refusal to dismiss her pendent state law claims because they were
 7 clearly barred by the statute of limitations forced the City to file a motion to
 8 dismiss, which was granted as to every one of Plaintiff's claims, but for the Section
 9 1983 claim. (Doc. 11.)

10 Therefore, Plaintiff's refusal to dismiss the claims in conformity with the
 11 legal precepts identified above was unreasonable and the City's Motion to Dismiss
 12 was well taken. Plaintiff's fees incurred in drafting six of the seven claims for
 13 relief, for prosecuting claims barred by the statute of limitations, filing two
 14 unsuccessful motions for relief from the claim filing statutes and for opposing a
 15 motion to dismiss the frivolous claims was unreasonable and unnecessarily inflated
 16 Plaintiff's fees. The fees are included in the 55.3 hours identified above and part
 17 of the \$38,353.50 that Plaintiff requests payment on at \$695 per hour.

18 **2. Plaintiff's Counsel Advertises a Free Consultation but Charges**
 19 **the City \$347.50 for the Initial Consultation**

20 The very first entry on Plaintiff's Counsel's invoice is for a half-hour by
 21 Mr. Mitchell for "Initial telephone conference with client on facts of claim against
 22 City, A. Arevalos . . ." However, Plaintiff's web page advertises a "Free Initial
 23 Consultations." (Phillips Decl., ¶ 9; Exhibit 5 to Phillips Decl.) The court should
 24 reduce Mr. Mitchell's fee by \$347.50 or .5 hours because his normal hourly rate
 25 for initial consultations is admittedly free.

26 **3. Plaintiff's Attorneys Fees Are Duplicative**

27 In *Thayer, supra*, 92 Cal.App.4th 819, the appellate court reversed a fee
 28 award of \$215,000 because of the "unjustified duplication of work that took

place.” *Id.* at 834. As the court noted, “[d]uplication was, indeed, the hallmark” with multiple hours spent in correspondence and phone calls between the different attorneys representing the parties claiming fees. *Id.* at 840-841 (emphasis added). Under these circumstances, the court found that “the *unquestioning* award of generous fees may encourage duplicative and superfluous litigation and other conduct deserving no such favor.” *Id.* at 839 (italics in original).

Similarly, in *Rey v. Madera Unified School Dist.*, 203 Cal.App.4th 1223 (2012), the appellate court held that the trial court had not abused its discretion when it significantly cut the number of compensable hours (from over 3,000 down to 500) after determining that the hours claimed by plaintiffs’ attorneys in the case were **duplicative** and thus inflated. *Rey*, 203 Cal.App.4th at 1243-1244.

In this matter, a very small portion of Plaintiff’s counsel’s billing was unnecessarily duplicative. However, since Plaintiff’s counsel is charging \$695 per hour, a 1/10th billing for \$69.50 must be addressed. Here, Mr. Mitchell bills .10 hours for preparation of an e-mail to his partner Dan Gilleon concerning the City’s informal statement on the motion to dismiss.

Accordingly, based upon *Thayer v. Wells Fargo Bank*, 92 Cal.App.4th 819, 846 (2001), et al., the court should strike .1 hours of Mr. Mitchell’s time as duplicative because it was for communication between Messrs. Mitchell and Gilleon who both represent the same party claiming fees. *Id.* at 840-841.

In sum, Plaintiff’s attorneys’ fee request is unreasonably and significantly inflated. Plaintiff’s counsel has over-billed their time claiming unreasonable fees for time spent on unsuccessful claims and unnecessary work, and duplicative efforts. Plaintiff is charging taxpayers for work it admittedly does for free, i.e., the initial consultation. Accordingly, the Court should reduce any award to account for the fact that Plaintiff incurred litigation fees unreasonably and unnecessarily and submitted such an unreasonable fee request to the Court.

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F. A Reasonable Fee Would Be Akin to Similar Litigation

When determining a “reasonable fee,” the Court may consider fee awards in similar cases. *Hensley v. Eckerhart*, 461 U.S. 424, 430, 103 S.Ct. 1933, 1938 (1983).

This case is unique in that Mitchell & Gilleon represented not only Plaintiff Wilde in this matter, but also represented the following five plaintiffs against the same defendants:

1. *Melissa Marin v. City of San Diego and Anthony Arevalos*. Case No. 12cv1264 JLS (BGS);
2. *Talia Tortora and Lacy White v. City of San Diego and Anthony Arevalos*, Case No. 12cv1265 MMA (WMC);
3. *Mary Bracewell v. City of San Diego and Anthony Arevalos*, Case No. 12cv1266-WQH (JMA);
4. *Clark Wong v. City of San Diego and Anthony Arevalos*, Case No. 12-CV-1818 W (JMA).

(Request for Judicial Notice, No. 2.)

All six plaintiffs represented by Mitchell & Gilleon settled in mediation at the same time but for Mr. Wong who settled shortly after. (Phillips Decl., ¶ 3-4.) Plaintiff’s fees for each are as follows:

1. Melissa Marin: \$15,000;
2. Talia Tortora and Lacy White: \$25,000
(Total for representing two plaintiffs);
3. Mary Bracewell: \$15,000;
4. Clark Wong: \$6,666.67.

(Phillips Decl., ¶ 3-4.)

In Mitchell & Gilleon’s representation of the other five plaintiffs against the City and Anthony Arevalos, Mitchell & Gilleon’s fees were between \$6,667 and \$15,000 per plaintiff for the same representation. (Phillips Decl., ¶ 3-4.) The

1 representation was on the same issues of law and all of the cases settled in
 2 mediation before discovery. (Phillips Decl., ¶ 5.) There is no need for a multiplier
 3 in this matter.

4 **G. Taxpayers Will Ultimately Pay For Any Award**

5 Additionally, in determining the amount of attorney's fees to award against a
 6 public entity, the California Supreme Court has expressly held that a trial court
 7 may consider "the fact that an award against [the public entity] would ultimately
 8 fall upon the taxpayers." *Serrano v. Priest*, 20 Cal.3d 25, 49 (1977); see also *San*
 9 *Diego Police Officers Assn. v. San Diego Police Dept.*, 76 Cal.App.4th 19, 24
 10 (1999) [affirming application of negative multiplier, which trial court based on
 11 several factors, including that "the award of fees would ultimately be borne by the
 12 taxpayers"].

13 In *Rey v. Madera Unified School Dist.*, 203 Cal.App.4th 1223 (2012), for
 14 example, the court noted that, "while there was no evidence the District would get
 15 additional revenues from the taxpayers to pay the award, it was likely that any
 16 amount paid by the District would instead be cut from educational services that
 17 would otherwise be provided to the District's students." *Id.* at 1243. The court in
 18 *Rey* ultimately reduced plaintiff's counsel's compensable hours from over 3,000
 19 down to 500. *Id.*

20 In this case, like in *Rey*, any amount awarded against the City will reduce the
 21 funds available to the City for services to the public. Accordingly, the Court
 22 should consider the fact that any award for fees in this case will ultimately fall
 23 upon the taxpayers of San Diego and reduce the award appropriately or deny an
 24 award altogether.

25 **H. Plaintiff's Lawsuit Did Not Confer a Significant Benefit on the Public**

26 In setting a reasonable fee award, the court should also consider whether,
 27 and to what extent, the Plaintiff's lawsuit benefitted the public. *McGown*, 565 F.3d
 28 at 1105. To determine this impact, the court should consider whether the Plaintiff

1 has affected a change in policy or a deterrent to widespread civil rights violations.
2 *Id.* In *Flannery v. Calif. Hwy. Patrol*, 61 Cal.App.4th 629 (1998), however, the
3 court rejected the argument that a private action brought by a plaintiff for her own
4 pecuniary benefit conferred a significant benefit on the public simply because it
5 purportedly “sent a message to the CHP and other governmental agencies” that
6 violations of the FEHA will not be tolerated. *Id.* at 636. Likewise, in *Weeks v.*
7 *Baker & McKenzie*, 63 Cal.App.4th 1128 (1998), the court found that the
8 plaintiff’s sexual harassment “action was brought not to benefit the public, but as a
9 means of vindicating Week’s own personal rights and economic interest.” *Id.* at
10 1170-1171.

11 Here, Plaintiff’s lawsuit did not have any broad public impact or result in
12 significant benefit to anyone other than Plaintiff. Like in *Flannery* and *Weeks*,
13 Plaintiff’s lawsuit was brought purely as a means of vindicating Plaintiff’s own
14 personal rights and economic interests.

15 Plaintiff had an opportunity to make a difference but passed when instead of
16 reporting Mr. Arevalos for soliciting a bribe, she made a deal with Mr. Arevalos to
17 avoid being arrested for driving under the influence. Plaintiff never filed a
18 Complaint or brought to light the fact that Mr. Arevalos was soliciting bribes until
19 after he was arrested by SDPD on March 11, 2011. Plaintiff waited until April 26,
20 2012, eighteen months after she agreed to let Arevalos touch her sexually to avoid
21 a DUI to file her civil complaint. (Phillips Decl., ¶ 11.)

22 Had Plaintiff filed her Complaint and notified the police department about
23 Mr. Arevalos, arguably, other women would have been spared their experience
24 with Mr. Arevalos. (Phillips Decl., ¶ 11.) Plaintiff never sought injunctive relief
25 or any other relief other than to pad her pockets. Hence, attorneys’ fees incurred
26 by a plaintiff that affects many people can easily be distinguished from the instant
27 case.

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I. The Court Should Deny any Attorneys' Fees Incurred in Seeking Fees

Finally, Plaintiff should also be denied an award for attorney's fees incurred in seeking fees. In *Meister, supra*, 67 Cal.App.4th 437, the court found that the plaintiff's fee request was unreasonably inflated and accordingly awarded the plaintiff no attorney's fees for the work performed by his attorneys in litigating his request for attorney's fees. *Meister*, 67 Cal.App.4th at 455. Where plaintiff's attorneys attempted to justify more than \$500,000 in fees for a case which achieved a modest award, the court concluded that the attorney's fees incurred in attempting to justify this unreasonable request were not hours "reasonably spent" on the fee litigation. *Id.* Hence, the trial court was found to have properly denied plaintiff any recovery for attorney's fees incurred in seeking fees. *Id.*

Similarly, in this case, Plaintiff is not entitled to seek attorney's fees incurred in seeking fees and costs. *Meister*, 67 Cal.App.4th at 455. The amount of fees Plaintiff seeks in filing her motion for attorney's fees is 12.75 hours of Mr. Mitchell's time for a total of \$8,861.25 and should be deducted from the total fees per the Court's discretion.

IV

CONCLUSION

For all of the foregoing reasons, the Court should exercise its discretion and significantly reduce such an award by subtracting out the inappropriate attorneys' fees claimed. The lack of complex issues, the lack of significant benefit to the public, the fact that any award will ultimately fall upon the taxpayers of San Diego, Plaintiff's counsel's unreasonable, unnecessary, excessive, and duplicative work and billing in this case, and Plaintiff's unreasonably inflated fees and costs request, call for such a result. Significantly reducing Plaintiff's requested fees would mean a similar fee for the same representation as other cases handled by Plaintiff's counsel against Arevalos and the City which was between \$6,667 and \$15,000 per

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1 plaintiff. This case was simpler due to the fact that as Plaintiff argues, the issue of
2 liability is “res judicata” due to Arevalos’ conviction.

3 Defendants urge the Court to award attorney’s fees to Plaintiff in the amount
4 of **\$20,929.75** for the reasons stated above.

5 Dated: May 3, 2013

JAN I. GOLDSMITH, City Attorney

6
7 Bv /s/ KEITH PHILLIPS

8 Keith Phillips
9 Deputy City Attorney

10 Attorneys for Defendant.
11 CITY OF SAN DIEGO
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